82-86-I

THE STATE OF NEW HAMPSHIRE

THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

February 14, 1984

Martha A. Ginty, M.Ed., R.N.
Executive Director
N.H. Board of Nursing Education
and Nurse Registration
105 Loudon Road
Concord, New Hampshire 03301

Dear Mrs. Ginty:

By memorandum dated July 26, 1982, you requested our opinion as to the information regarding a licensee that must be made available to the public and whether the Board must send out the information or make it available at the Board's office. It is our opinion that all information regarding a licensee must be made available to the public unless there is an applicable right-to-know law or case law exemption. Furthermore, the burden is on the Board to show that such an exemption exists. Since the Board's only obligation is to make any records that exist and are not exempted available to the public for review or photocopying, there is no requirement that you mail copies of the records to the person requesting them, though you may choose to do so for efficiency's sake.

The broad purpose of the right-to-know law is to encourage public access to the meetings and records of public agencies. This purpose is outlined in RSA 91-A:1:

> "The purpose of this chapter is to ensure both the greatest possible access to the actions, discussions and records of all public bodies, and their accountability to the people."

RSA 91-A:4, I provides that

> "[e]very citizen during the regular or business hours of all such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all public records, including minutes of meetings of the bodies or agencies, and to make memoranda, abstracts, and photographic or photostatic copies of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5."

Most documents in an agency's possession would be considered public records, within the meaning of the right-to-know law, unless one of the exemptions contained in RSA 91-A:5 applies. Of these exemptions, paragraph IV is the most relevant:

> "Records pertaining to internal personnel practices, confidential, commercial, or financial information, personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy."

Undoubtedly, there are documents in files kept by the Board, such as confidential recommendations for individual applicants, which would qualify as confidential records within the meaning of this exemption to the right-to-know law. All such records must be reviewed on an individual basis to determine whether they are exempted records. The agency must have good reason, however, for invoking the provisions of this exemption; it may not simply mark a document "confidential" as a means of avoiding disclosure. Moreover, the language "invasion of privacy" is not to be so broadly construed as to defeat the purpose of the right-to-know law. Mans v. Lebanon School Board, 112 N.H. 160 (1972). In determining whether or not a record is "confidential," other statutes or privileges recognized by law must be reviewed. Thus, it should be noted that while RSA 329:26 recognizes the confidentiality of communications between a physician, or person working under his supervision, and his patient, this confidentiality does not apply to disciplinary proceedings conducted by the board of nursing education and nurse registration, as that statute itself indicates.

The courts have established certain exceptions to disclosure, including legal advice from the agency's legal counsel, Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Commission, 115 N.H. 192 (1975), drafts of certain documents, and intra-office communications, Gordon v.

Office of Legislative Services, Eq. #20,987, Merrimack County Superior Court (Feb. 1, 1974), and police investigative files, Lodge v. Knowlton, 118 N.H. 574 (1978).

It should also be noted that any documents or material which an agency is permitted to receive while in executive session, see RSA 91-A:3, would probably not be subject to disclosure to the extent it would frustrate the purpose for the executive session.

As the Supreme Court has noted, however, questions about the disclosure of public records will be resolved in such a way that the "utmost information" will be provided. Menge v. Manchester, 113 N.H. 533, 537 (1973).

In light of RSA 91-A and the decisions of the New Hampshire Supreme Court, any public record requested should be made available unless one of the exemptions cited above applies. Information such as that requested by Mr. Kazan in his 1982 letter to the Board must therefore be made available.

As to the providing of copies, the Supreme Court has determined that the right-to-know law does not impose an absolute duty on agencies to provide copies of public records to citizens. Gallagher v. Town of Windham, 121 N.H. 156 (1981). The law only requires that the records be made available for inspection and reproduction.

I trust this has answered your question. Please let us know if you requiring anything further. Thank you for your patience.

Sincerely,

Douglas L. Patch
Assistant Attorney General
Division of Legal Counsel

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